

DAVIS, GRAHAM & STUBBS

ATTORNEYS AT LAW

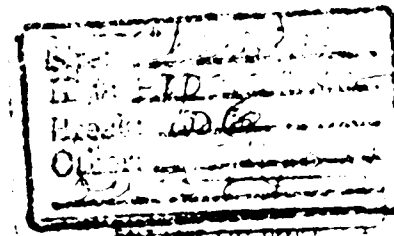
WASHINGTON D.C. OFFICE
SUITE 500
1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2402
TELEPHONE 202-822-8660

SUITE 4700
370 SEVENTEENTH STREET
DENVER, COLORADO 80202

MAILING ADDRESS
POST OFFICE BOX 185
DENVER, COLORADO 80201-0185

TELEPHONE 303-892-9400
TELECOPIER 303-893-1379

TELEX 240451 DGS DVF
CABLE DAVGRAM, DENVER



SUITE 1600-B7
EAGLE GATE TOWER
80 EAST SOUTH TEMPLE
SALT LAKE CITY, UTAH 84111-0006
TELEPHONE 801-328-8000

ELIZABETH H. TEMKIN
892-7436

November 10, 1989

E. Jane Kloeckner
Assistant Regional Counsel
United States Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

Re: Cherokee County Superfund Site--RI/FS
Administrative Order On Consent and Proposed Work
Plan for Baxter Springs and Treece Subsites

Dear Ms. Kloeckner:

Pursuant to our discussions of October 6, 1989 and on behalf of the below-listed PRPs (the "Respondents"), we enclose for your review three copies of a revised draft RI/FS Administrative Order On Consent (the "Order") and a Proposed Work Plan (the "Work Plan"), for the Baxter Springs and Treece Subsites. Also enclosed are three copies of a redlined version of the draft Order you provided to us on October 6th, which should assist you in tracking our suggested changes.

With respect to the Order, we have tried to preserve the essence of the Order, balancing your suggested approach against differing experiences some of the Respondents have had at other sites. We have eliminated some duplication and moved work plan-related details, including proposed schedules, to the Work Plan itself. We have also incorporated more substantive revisions, all of which we believe to be fully consistent with EPA guidance and likely to facilitate the RI/FS process.

First, as you will note in Article V (Determinations), we have included a statement that Respondents' liability shall be determined on a subsite by subsite basis in accordance with our previous conversations with EPA concerning this issue.

Second, Article IX (Additional Work), as previously written, left ambiguous the circumstances under which the Respondents could be required to perform additional work. To clarify this ambiguity, we have revised Article IX. In that



S00031519
SUPERFUND RECORDS

E. Jane Kloeckner
November 10, 1989
Page 2

connection, we have retained EPA's authority to determine that additional work is necessary under certain circumstances and to request that the Respondents perform that work. However, Respondents' failure to perform the additional work is not violative of the Order. In the event that Respondents do not perform the additional work, EPA may do the work and seek recovery of its costs. We have found this approach to be workable in the RI/FS context and acceptable to EPA at several other Superfund sites.

Third, we have deleted what was Article XVIII (Reimbursement of Past Costs) in EPA's original draft based on our conviction that it is premature to address this issue. Region VII itself has agreed to delay negotiations on the recovery of past response costs in the interest of allowing the remedial studies to proceed as quickly as possible. Furthermore, it is our collective experience that past costs are best addressed in the remedial context. Finally, as we proceed and, presumably, the list of responsible PRPs is refined, it will be easier to address the question of what share of those prior costs should fairly be borne by each PRP.

Fourth, as you will note in Article XVII (Reimbursement of Oversight Costs), we have retained the basic construct regarding EPA's recovery of oversight costs, while establishing a procedure for review of EPA's accounting of costs prior to payment. This approach comports with our experience at other Superfund sites, and does not impair EPA's entitlement to response costs. In addition, we are aware of alternative approaches to oversight costs which have been included in other orders and we raise them in this letter (although not in the attached Order) for discussion purposes. For instance, EPA has agreed to forego reimbursement of oversight costs when there are non-settling PRPs, agreeing to pursue the non-settlers for these costs. In addition, in certain orders, EPA has agreed to seek reimbursement for direct oversight costs only. Finally, a third option would be to set a cap on reimbursable oversight costs, perhaps premised on the EPA's position that oversight costs typically amount to approximately ten percent of the cost of the work.

Fifth, we have revised the format for Dispute Resolution contained in Article XX. In particular, we have added language to the effect that EPA's statement of decision regarding a dispute constitutes final agency action subject to judicial review. Again, we have found this approach to be workable in the RI/FS context and acceptable to EPA in a consent order context at other Superfund sites.

E. Jane Kloeckner
November 10, 1989
Page 3

Sixth, we have modified the schedule for stipulated penalties provided for in Article XXIII (Stipulated Penalties). The Work Plan identifies a list of deliverables triggering stipulated penalties which differs somewhat from EPA's list as originally contained in Article XXIII. We have grouped the deliverables by category and arranged a penalty schedule that reflects the relative importance of each category of documents. In addition, we have provided for a brief grace period and modified the dollar amounts, reflecting Respondents' good faith, voluntary efforts to date and their success in meeting previously established, tight deadlines. In addition, we have found that it is never the day or so delay that negatively impacts the ultimate schedule.

Finally, the most noteworthy revision to the Order is the inclusion of a Work Plan for RI/FS activities at Baxter Springs and Treece. We have proposed a comprehensive, iterative approach to the RI/FS process as required by EPA's RI/FS Guidance (OSWER Directive 9335.3-01) (the "Guidance") and the National Contingency Plan, 40 C.F.R. Part 300 (the "NCP").

As proposed, the RI/FS process at the Baxter Springs and Treece Subsites begins with a formal evaluation of all existing data, from which a draft prototype RI, Endangerment Assessment ("EA") and FS are prepared. Against this backdrop, Respondents will evaluate the data needs and data quality objectives that must be addressed so that the RI/FS can provide needed information and support EPA's remedy selection.

This approach is well-suited to the Baxter Springs and Treece Subsites for several reasons. First, there is significant data already available concerning these subsites, other subsites (particularly Galena), and the Cherokee County Superfund Site as a whole. Data from EPA's investigation at the Tar Creek Superfund Site in Oklahoma may be available for consideration as well. Second, by formatting the data in "final" form at the outset, EPA and Respondents will be able to identify problematic issues and concerns about data needs and quality early on, instead of after the field work contemplated by the Order has been completed and the Record of Decision date is pressing. In other words, taking the time to organize thoughts and data at the outset should save considerable time, effort and stress later on. In any event, as proposed, the RI/FS process will not take longer than envisioned by EPA. Finally, the collection of additional data will be focused, efficient and well-directed in terms of the ultimate use of the information; an objective we know the NCP aspires to, see generally 40 C.F.R. § 300.68, but infrequently seems to attain. We believe this approach is consistent with the prescription in the guidance for an "interactive," "iterative"

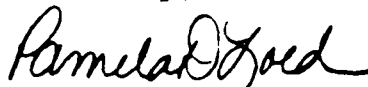
E. Jane Kloeckner
November 10, 1989
Page 4

and "dynamic" RI/FS process, "tailored to specific circumstance of individual sites." Guidance, pp. 1-3.

Given the nature of the work involved at the Baxter Springs and Treece Subsites, and the site as a whole, we suggest that it may be more appropriate to proceed with a Partial Consent Decree as opposed to an Order. Obviously, a decree would embrace provisions beyond the Order as it is presently drafted, for instance, a covenant not to sue, contribution protection, and a different dispute resolution format. In addition, adoption of this approach would depend, in part, on EPA's willingness to dismiss without prejudice any complaint filed to support the Consent Decree, leaving for later resolution issues associated with remedy implementation. We bring this to your attention for your consideration and discussion with the Respondents.

In light of the current status of this matter and the fact that some of our proposed changes probably require further explanation, we would like to suggest a "lawyers meeting" before Thanksgiving, between you and two or three PRP representatives to discuss the concerns and questions of EPA and the Respondents. Please contact any one of us to discuss next steps.

Sincerely,



Elizabeth H. Temkin

Pamela D. Lord

for

DAVIS, GRAHAM & STUBBS

on behalf of

AMAX Mineral Resources Co.;

Gold Fields American Corp.;

St. Joe Minerals Corp.;

NL Industries, Inc.;

Eagle-Picher Industries, Inc.; and

Sun Company

/vf